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Labor Legislation

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It should finally be noted that the elimination of the capital gains treatment would conflict with the purpose of the investment credit—to dispose of old equipment and invest in new equipment. The high tax resulting would perhaps discourage the sale and exchange of old equipment, and the incentive value of the investment credit would thus be greatly handicapped.[43]

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LABOR LEGISLATION

The House Committee on Education and Labor appointed a subcommittee, under the chairmanship of Roman C. Pucinski of Ohio, to investigate the procedural ineffectiveness of the National Labor Relations Act. The subcommittee was to determine why collective bargaining has so often been fruitless and why unfair labor practices have shown a marked increase. The greater portion of the testimony heard by the subcommittee presented the "labor view" since management's response to the subcommittee's invitations to appear was very poor. The scope of this discussion is restricted to a treatment of the more important problems dealt with by the subcommittee.[1]

By far the most serious problem facing labor today is the delay in achieving enforcement of its federally granted rights. This problem primarily arises either in the context of representation or unfair labor practice cases. In these areas, speedy settlement of disputes is essential to insure justice to the parties and vital to the effective administration of the National Labor Relations Act. Delay has all too often diminished the effectiveness of many remedies on which labor can no longer rely with assurance. In representation cases, the prejudicial effect of delay has been summed up by the statement of Alvin Ackerman of the Baltimore Retail Clerks:

> What does delay mean to an employer? It means that he has time to engage specialists in union busting, who can mount a full-fledged propaganda campaign against the union. He has time to hire new employees to pad the eligibility list. He has time to get rid of employees who are active union leaders. He has time to raise wages. He has time to shorten hours. He has time to make endless promises about what he will do for his employees, if they vote against the union. He has time to make dire predictions about the jobs which

[43] Section 1231 of the Internal Revenue Code of 1954 came into the law in 1942 to relieve taxpayers of ordinary income tax rates on gains resulting from involuntary conversions, sales and exchanges prompted by the circumstances of the war effort [See H.R. Rep. No. 2333, 77th Cong., 1st Sess. (1941)]. This provision compensated for the rise in prices of used machinery during the war. This aspect of the problem still is with us today in the form of inflation.

[1] The committee took up ten areas in all: the problem of delay, enforcement of NLRB orders, the General Counsel, issuance of complaints, inequities in the use of injunctive remedies, free speech, community pressures, NLRB determination of the appropriate bargaining unit, the Board's policy-making function, changes in rules of practice, and organization and management of the Board. This study will discuss the first six.

> will be lost, if the employees vote for the union. It means that he can cause the employees to become frustrated and worried and frightened.[2]

According to the testimony, the causes of delay are many. An increase in the tremendous caseload of the NLRB has been a significant factor.[3] A proportionate increase in the backlog of pending cases has also necessarily occurred.[4] However, this increase has not been accompanied by any remedial Board action.

Section 9(c)(1) of the Labor-Management Relations Act requires that the hearing officer in election cases shall make no recommendation. The subcommittee is of the opinion that the deletion of this requirement will shorten the delay. On May 17, 1961, the Board put into effect a new policy[5] by making the decision of the regional director final, subject to a limited review by the Board in Washington.[6] If the Board does not expand the limited grounds for appeal, this solution can be of great value. It has been estimated that this will cut down the delay from 110 to 70 days, an impressive but still seemingly ineffective reduction since seventy days constitutes a long delay. However, the first eight decisions issued by regional directors pursuant to this policy consumed only thirty-two days or less, a significant reduction.

As an alternative, several proponents of labor urge a return to the pre-Taft-Hartley days. Under the Wagner Act in 1946, with the election preceding the hearing, in only 16 out of 118 cases was a hearing desired after

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[2] House Subcommittee on the National Labor Relations Board, Administration of the Labor Management Relations Act by the N.L.R.B., 87th Cong., 1st Sess. (1961). Ogden Field, Executive Secretary of the NLRB, testified that in one instance in February, 1961, 132 days elapsed between the filing of notice of hearing in a representation case and the final decision of the Board. Note that these are median figures. This figure is not the whole story, for another thirty days is used up in elections, and then if the election is challenged further investigations, appeals, and hearings will cause an additional three to six month delay.

[3] The number of cases before the NLRB has increased from 1500 during the first few years after the passage of the Taft-Hartley Act to 6,617 in 1960.

[4] The increase in backlog has kept pace from 200 cases in 1958 to 676 cases in 1961.

[5] The press release of the Board explaining this change said in part:

> For any representation petition filed on and after that date, the Board's regional directors will have authority to decide whether a question of representation exists, to determine the appropriate collective bargaining unit, to direct an election to establish whether the employees wish to be represented by a particular labor union for collective bargaining, and to certify the union as bargaining agent if it wins the election. Action taken by regional directors under this delegation will be final, subject to review by the Board in Washington on restricted grounds.

Subcommittee Report, 11.

[6] The restricted grounds include:

(1) where a substantial question of law or policy is raised because of (a) absence of, or (b) the departure from, officially reported Board precedent.
(2) where a regional director's decision on a substantive factual issue is clearly erroneous and such error prejudicially affects the rights of a party.
(3) where the conduct of the hearing in an election case or any ruling made in connection with the proceeding has resulted in prejudicial error.
(4) where there are compelling reasons for reconstruction of an important Board rule or policy.

voting.[7] Of course, no one seriously proposes a return to the Wagner Act because under this act, the NLRB was given the all-inclusive power of judge, jury, and prosecutor of the same case. However, it is submitted that, if the "increased delegation" plan fails, some kind of system analogous to "leave reserved" may be the solution. A system may be possible whereby the immediate results of an election could be achieved "while the iron is hot," and all the problems of delay avoided. If the election was held with "leave reserved" and a violation was later found to have occurred, the election could be reversed or nullified. Further support for this suggestion is the fact that a great part of the delay is due to the Board's allowing time consuming appeals in cases which are, at best, frivolous.[8] This suggestion of "leave reserved" would force the minority of truly issuable cases to await the hearing, while the vast majority of cases will be afforded immediate justice.

Further, it is assumed that there exists a right to a hearing. According to the act, this is not so. It is required that an investigation and then an "appropriate" hearing be granted, if the facts so demand. The subcommittee recommended that the Board consider the adoption of regulations designed to prevent abuse of its process by dilatory practices.[9] It does seem that a hearing should be a matter of right, but considering the high percentage of dilatory appeals, the hearing must be granted selectively. The "leave reserved" suggestion could be a way of granting a hearing as of right and avoiding delay at the same time.

Another facet of the delay problem is as it is involved in unfair labor practice cases. Once an unfair labor practice charge is filed, it is months before a decision is reached. In addition, the decision itself is not really final because a court order is necessary to enforce it.[10] Often that delay renders the judgment meaningless because the movement has cooled, or more likely, has been crushed. The workers involved, though eventually reimbursed, have gone two years without pay. This situation is abhorrent to any sense of fairness.

What is the cause of this delay? Here again, the increasing caseload takes its toll.[11] Congress has appropriated more money for additional legal

[7] Out of 118 cases in 1946, 102 were processed without necessity of a hearing, 36 being closed on the basis of recognized agreements with successful unions, 27 being closed by Board certification, 39 closed by withdrawal of losing unions.

[8] This is illustrated by the fact that 87% of these appeals are dispensed with by the short form, which is used where there is no issue at all. Even though the short form is used, however, the delay still exists. It has been estimated that only 2% of these appeals actually involve an issue. As the law stands, then, the 87% are suffering for the 2%.

[9] Among those regulations are the challenged ballot system and the disbarring of lawyers wilfully recommending dilatory methods.

[10] Jacob Sheinkman, general counsel for the Amalgamated Clothing Workers of America, pointed out that in a case in which the first charges were made in September of 1955 "more than two years were consumed from the date of the filing of the original charge to the time that any remedy became applicable." It is interesting to note that once the worker was reinstated on October 2, 1957, he was fired again on October 3, and another two years were consumed. In this case, the employer demonstrated that the workers had no protection.

[11] The number of unfair labor practice cases before the Board has increased from

counsel, but the Board itself has only five members, and this is the "bottleneck."[12] It is the policy of the Board to allow appeal on request. In addition, the appeal is de novo in character. The statistics illustrate that there is a serious waste of time involved both in the double work and in the reviewing of unmerited cases.[13]

A necessary first step toward the solution of this problem is to give some degree of finality to the trial examiner's decision. It may be a solution, therefore, to adopt a method of selectivity. One such method of great value would be to employ a system analogous to the certiorari system of the United States Supreme Court. Under this system, a requisite for appeal could be to convince at least two members of the Board that an important issue of policy, a close or disputed question of fact, or a serious and prejudicial error is involved.[14] In the absence of one of these requisites, there seems to be no basis, and, therefore, no justification for appeal. Also, in a case where an appeal is appropriate, there is no need to continue the de novo review. As a solution to this problem, the President's Reorganization Plan No. 5 of 1961 was sent to Congress. This plan authorized the Board to delegate responsibility to its employees. Congress and the subcommittee advised that the Board already had this authority under Section 8(a) of the Administrative Procedure Act.[15] However, the subcommittee recommended that the Board give consideration to adopting a system of limited review. This recommendation leaves the responsibility to the Board, and it is hoped that they follow through. If not, a legislative mandate along these lines will become necessary.

Another cause of the delay in unfair labor practice cases is that the Board simply does not offer an adequate remedy. There are two aspects to this problem. The first involves Section 8(a)(1) of the Labor Management Relations Act, which deals with interference with employees' rights of self-organization. David J. McDonald, president of the United Steelworkers, in attempting to illustrate that the remedy is "too little and too late," stated that "these penalties, which are known and fixed, are frequently no more oppressive to an employer than a license fee for union busting." He concluded that the union is helpless unless the employer consents to organization and collective bargaining, and in this way, "what is a right under the law becomes a favor, and therefore no right at all."[16]

The employer is protected from unfair labor practices by the use of the 10(l) mandatory injunction of the Labor Management Relations Act. The Joy Silk Doctrine, *i.e.*, the application of injunctive relief by the Labor

5,506 in 1957 to 12,239 in 1959, with a corresponding increase in backlog from 190 in 1958 to 440 in 1961.

[12] In May, 1961, it took 393 days to process a case, 165 of those days being consumed at the Board level.

[13] Since August of 1953, 16,362 cases were decided, 96% unanimously, with a 75% correlation with the trial examiner's decisions.

[14] Subcommittee Report, 21.

[15] The plan was defeated on unrelated grounds and this defeat, of course, can not be viewed as legislation for the opposite ilk.

[16] Subcommitttee Report, 22. William Pollack, president of the Textile Workers Union of America, testified that the Taft-Hartley penalties are so light that employers often regard them merely as business expenses.

Board "to require the employer to recognize and bargain with a union which clearly represents the majority of its employees prior to the initiation of the employer('s) unfair labor practices," was used extensively in the Wagner Act days.[17] As will be demonstrated below, injunctive relief against management is used very sparingly, and it is withheld in many cases where it would effect an equitable solution. The subcommittee has recommended that the Board revitalize the Joy Silk Doctrine. Equitable relief is the sensible, and in fact, the only effective remedy against management's unfair labor practices.

The second facet of the inadequate remedial powers of the Board involves Section 8(a)(5) of the Labor Management Relations Act, which deals with the refusal of management to bargain in good faith. Once a union wins a representation election, it still faces the task of achieving a fair contract through collective bargaining.[18] A recalcitrant employer can force the collapse of collective bargaining. Such conduct will inevitably lead to a strike, the subsequent hiring of strikebreakers, and the ensuing social strife. One cause of this dilemma stems from Section 8(d) of the Taft-Hartley Act which provides that an obligation to meet and confer in good faith "does not compel either party to agree to a proposal or require the making of a concession." The minority House Report dealing with this amendment realistically saw that this rendered collective bargaining sterile as the amendment "is designed to encourage persons *not* to accept proposals. . . ." This minority's "prognosis" has proved to be true. It seems that token compliance with the requirement of good faith bargaining is not sufficient.[19] The subcommittee recognized the issue but did not put forth a solution. It seems that the problem involves the balancing of two contrary considerations: fair results, on the one hand, and freedom of choice, on the other. Actually, an effective solution would involve the NLRB's setting substantive terms of collective bargaining contracts and both sides obviously dislike this.

In other federal acts in force there are penalties which, if applied in the area of labor management relations, might provide adequate deterrent value. One proposal would make the commission of unfair labor practices penal,[20] another would create a civil cause of action for parties suffering damages through violation of the act,[21] and still another would bar those who employ unfair labor practices from government contracts.[22] But, the subcommittee did not recommend any of these, rather it prefers to await the results of its two former suggestions, *i.e.*, that the Board adopt a certiorari type of review in unfair labor practice cases, and that the Labor Board impose more realistic remedies in these situations.[23]

The problem of delay extends even further. Once the Board has reached

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[17] Subcommittee Report, 23.

[18] A contract is achieved in only 61% of union victories and 17% of these contracts are not renewed.

[19] Subcommittee Report, 25-26.

[20] Railway Labor Act, 44 Stat. 577 (1926), 45 U.S.C. § 152 (Fourth) (Tenth) (1958).

[21] Labor Management Relations Act, 49 Stat. 456 (1935), as amended, 29 U.S.C. § 162 (1958).

[22] Walsh Healy Act, 49 Stat. 2037 (1936), 41 U.S.C. § 37 (1958).

[23] Subcommittee Report, 35-38.

a decision under present law, judicial enforcement of that decision is needed. The subcommittee recommended a legislative change in sections 10(e) and 10(f) to require that, in the absence of agreement to comply with the Board order, if a petition for review is not filed within thirty days in the appropriate Court of Appeals by the party seeking review, then the General Counsel would be required to file a copy of the Board decision and order in such circuit Court of Appeals. Notice of the filing would be sent to respondents named in the order. An additional fifteen days would then be given to the respondent to seek review by the court. If no such request for review is forthcoming, the clerk of the court would issue a decree enforcing the order of the Board. In this manner, the orders of the Board become self-executing. It does not seem unfair to put the burden on the respondent to comply with the Board's order or to seek prompt judicial review.

Another obstacle in the path of harmonious labor-management relations is the position of the General Counsel. The General Counsel has the absolute power to decide whether or not a complaint shall be issued. Should the Counsel decide against a petition, the petitioner has no other course of action. Many union spokesmen testified that the General Counsel processes only the "sure things."[24] Several methods are suggested to cure this defect. Some strong proponents of the labor point of view again urge a return to the Wagner Act. They point out that the two-headed system of the Labor Board and the General Counsel is unwieldy. On the other hand, the N.A.M. recommends the maintenance of the status quo, urging that the Taft-Hartley amendment was passed to prevent the Board from being grand jury, judge, and prosecutor. The subcommittee agreed and recommended that, as a minimum, the strict separation of functions be maintained within the Board.[25]

One suggestion is that a complaint be issued whenever a charge makes out a prima facie case. This would guarantee a day in court to all valid cases. A further possibility is to allow private parties to file before the Labor Board or to conduct a proceeding in which the General Counsel would prosecute without adopting the view of a complainant.[26] This is objectionable

[24] "Summary Report, Operational Activities, Office of the General Counsel of N.L.R.B., Calendar Year 1960" states that in cases litigated before a trial examiner, the percentage of wins for the General Counsel runs between 76 and 81 percent. That figure is, however, misrepresentatively low, since it does not take into account the fact that a high percentage of merit cases are settled on the merits before the issuance of a complaint. Settlements can only be considered as wins, since it is Board policy not to seek settlement unless there is merit to the case. . . . Considering all merit cases and considering settlements as wins, the General Counsel . . . for the period April 1960 to December 31, 1960, won 92 percent of his cases. If the General Counsel is winning 92 percent of his cases, he is only prosecuting in those cases where he is 92 percent sure of winning.
Id. at 39.

[25] For an excellent summary of the Board's internal procedures, see Ida Klaus, The Taft-Hartley Experiment in Separation of NLRB Functions, 11 Ind. & Lab. Rel. Rev. 371, 372-75 (1958). And see also Gellhorn & Linfield, Politics and Labor Relations, 39 Colum. L. Rev. 339, 388 (1939); Attorney General's Committee on Administrative Procedure, the National Labor Relations Board, Sen. Doc. No. 10, pt. 5, 77th Cong., 1st Sess. 14-15 (1941).

[26] This would be in the nature of an ex rel. proceeding.

because the uniform character of labor relations would be jeopardized. In addition, if any complainant could force suit, the caseload and delay would be increased. Still another suggestion is that a limited appeal to the Board be allowed. It would seem that this would destroy the separation of functions. Another proposed remedy is to require greater specificity in the reasons for refusal to issue a complaint.[27] In the light of these and other suggestions, the subcommittee recommended that the General Counsel shall issue a complaint whenever it appears that a violation may have occurred, and if he refuses to issue a complaint, he must issue a complete statement of his reasons. If the subcommittee interprets this to mean that the issuance of a complaint is mandatory in a prima facie case, it may prove to be a sensible solution. In addition, the necessity of a clear statement of reasons will discourage the General Counsel from prosecuting only the "sure things".

Another problem in the administration of the National Labor Relations Act concerns the uses of injunctive relief. There are two types of injunctions commonly used in labor cases. One is a mandatory injunction which can be employed only against unions. This 10(l) injunction is to be sought when there is "reasonable cause to believe" that unfair practices are being conducted by a union. Since the Board moves slowly, this temporary injunction has a permanent effect on union activity.[28]

The 10(j) discretionary injunction is to be used against both labor and management engaged in unfair labor practices. Of the total injunctions granted under 10(l) and 10(j), only one per cent are issued in behalf of unions;[29] but it must be understood, however, that 10(l) injunctions cannot be sought by unions. Considering this to be an extremely unfair situation, the subcommittee recommended that 10(j) be utilized to a greater extent where there is reasonable cause to believe that unfair labor practices will tend to cause irreparable harm or personal injury, or violate the rights granted under section 7.

One of the most difficult problems facing the National Labor Relations Board is to achieve a balance between free speech and fair results. Some segments of management claim freedom of speech as a protection for "race hate" and "captive audience" practices. The subcommittee condemned use of the former, and, as to the latter, recommended that the NLRB allow the union equal time for proselytization.

The subcommittee has pointed up some problems inherent in the nation's labor policy. It is hoped that Congress will turn an attentive ear to its recommendations.

STEPHEN J. PARIS

[27] The General Counsel dismisses complaints labelling them insufficient. However, there is no real value in this since the General Counsel's acts are final.

[28] Some argue that this is not so because 10(l) cases are priority cases. However, there are so many so-called priority cases that the term is rendered meaningless.

[29] From 1953 through June, 1959:
10(l) injunctions granted—601 (exclusively against unions)
10(j) injunctions sought—23
against labor—17
against management—6.